NO. 42642-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHARLES J. NAKANO,
Appellant,

v.

STATE OF WASHINGTON DEPT OF L&I,
Respondent.

BRIEF OF APPELLANT

Jack W. Hanemann
Attorney for Appellant

JACK W. HANEMANN, INC., P.S.
2120 State Ave NE, Suite 101
Olympia, WA 98506
360-357-3501

WSBA #6609

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case law

Statutes

I. STATEMENT OF THE FACTS

A. Background of Claim

Charles Nakano was critically injured when a machine he was working on rolled over crushing his pelvis and legs. At one point he was given CPR for over 20 minutes. The date of these injuries is 6/27/08. Mr. Nakano went through lengthy hospitalizations, many surgeries and recovery. He is still unable to work. Medical services paid exceeded $600,000.00. He also received time loss, total benefits exceeding $660,000.00. A year and a half after allowing the claim the Department decided Charles Nakano was not an employee but an independent contractor. They demanded he pay them back.

An order dated 10/6/09 was issued claiming Mr. Nakano had committed fraud and demanding almost $1,000,000.00 in overpayment. This order was timely protested. An order dated 2/5/10 was sent with nearly identical information again claiming fraud on Mr. Nakano's part assessing nearly $1,000,000.00. This order was also protested on 4/13/10.

Mr. Nakano asserts he has a valid defense to the claim of fraud or willful misrepresentation. Charles Nakano was an employee at the time of his injury. This assertion is supported by the fact that the criminal fraud

charges that were filed against him in Lewis County have since been dismissed. See attached Order of Dismissal without Prejudice entered 10/21/10. (BR = Board Record)

B. Facts

Mr. Nakano has been represented by this firm since October 2009. This firm's policy is to date stamp all Labor & Industries documents when received. (Testimony of Karen Neill, TR 13) The 2/5/10 order received by this law firm has no date stamp on it. The procedure at the firm is when mail is received the receptionist is to date stamp it. Karen Neill was an experienced receptionist and was the firm's receptionist until February 5, 2010, when Karen was promoted to legal assistant. Commencing the week of February 8, 2010 Julie Waller became receptionist. Karen Neill trained Julie the week of February 8, 2010 and was personally present on February 8, February 10, and February 11, 2010 when the mail was delivered to the law firm. Karen Neill testified that if the 2/5/10 Order was received on any of those dates (2/8, 2/10, or 2/11/10) it would have been date stamped. (TR 15-16, 35)

Ms. Neill testified that although she personally did not supervise Ms. Waller February 9, 2010 that another member of the law firm did. All mail on that date would have been date stamped.

Ms. Neill testified that it was not uncommon for Labor & Industries mail to be received more than 5 days after the date printed on the Order. She estimated it happens at least once every 1-2 months (TR 32). If an Order was received on February 8th, 9th, 10th, & 11th it would have been date stamped. If the order was received on February 12th or 13th it may not have been date stamped this is because the new receptionist did make some mistakes when she first started.

Exhibits 2 and 3 were admitted into evidence by Lewis County Superior Court Judge Lawler. These are official publications of the United States Postal Service. They are posted on the United States Postal Service website. These two publications document that first class mail (3-5 day delivery) is delivered later than 5 days ten percent of the time.

The Industrial Appeals Judge in his decision believed the firm most likely received the 2/5/10 Order on February 10, 2010 because of the testimony of Frank Parascondola, the firm's former legal assistant, who was responsible for dealing with Labor & Industries. However, Mr. Parascondola's testimony was quite equivocal on when he received the order.

Mr. Parascondola was the legal assistant responsible for dealing with Labor & Industries files. He testified that he had notes of contact with

the employer and Mr. Nakano on February 9 and February 10, 2010. These notes were kept as business records and admitted as Ex. 8. On February 9, 2010 Mr. Parascondola called a potential witness to the case, N. Bolander and faxed a request for employer records to Carol Nakano, the bookkeeper for the employer (TR 57 BR Ex 8). Frank Parascondola testified that if the Order dated February 5, 2010 had been received on February 9, 2010, he would have said to the bookkeeper "Hey I've gotten an Order" and made record of it. No mention of the Order appears either in his notes of that date or in the fax sent to Carol Nakano.

On February 10, 2010 Frank Parascondola spoke with the Petitioner Charles Nakano and made an entry summarizing the telephone conversation on that date:

> Q. And what was the substance of that entry?
>
> A. It says "TC," which is telephone call, "to Charles to let him know I called both of them and I wanted to know if he had heard anything from them."
>
> Q. Who's the Charles you're referring to?
>
> A. Charles Nakano.
>
> Q. Okay. And again, if you had been aware of a or had received a fraud order dated February 5th, 2010,

would you have mentioned it or noted it in your notes in your conversation to Mr. Nakano?

A. Definitely, definitely to Mr. Nakano. (TR64)

This phone contact occurred at 5:14pm. It is simply inconceivable that if the 2/5/10 fraud Order for almost a million dollars had been received on or before 2/10/10 that Mr. Parascondola who spoke to Mr. Nakano after 5pm that day, would not have mentioned it to Charles Nakano in their phone conversation. The mail for February 10, 2010 had been received when Mr. Parscondola had the conversation with Mr. Nakano.

In response to a question by the Assistant Attorney General Mr. Parascondola testified that he could not recall what time of day he spoke to Mr. Nakano on February 10, 2010 (TR90). The Assistant Attorney General inferred that the 2/5/10 Order could have been received on February 10, 2010 and that the telephone conversation with Mr. Nakano could have occurred earlier in the day before the mail was received. However, the law firm's telephone record establishes that the telephone call was after receipt of mail on February 10, 2010 at 5:14pm

Mr. Charles Nakano also testified that due to mail issues he didn't receive the 2/5/10 Order until one and half months before the hearing.

When he did receive the 2/5/10 Order it did not have a date stamp on it nor did it have any marks indicating when it was copied to him (TR37, BR Ex.4).

The order dated February 5, 2010 in the firm's file did not have any marks on it showing when it was sent to the client nor was it date stamped. The law firm's receptionist and later a legal assistant testified that if the order had been received on February 8th, 9th, 10th, or 11th, it would have been date stamped because either herself or another experienced person was with the new receptionist when the mail was received. February 12th was the first date the new receptionist was on her own. This was the first time mail received may not have been date stamped.

The Superior Court believed the 2/5/10 Order was most likely received February 10, 2010 because Mr. Parascondola testified as follows on cross examination:

> Q. And do you recall testifying on your July 15, 2010 discovery deposition that the order said cc'd to the client on February 10th, so he must have received it around the 10th?
>
> A. Yes, because the document I was looking at when I was talking to Mr. Gruse, the document said cc'd

client on 2/10 of 2010, assuming it was the 10th and assuming it was the document. I remember calling him and telling him that I was looking at the incorrect document, I believe, in one of the conversations. So I really don't know when I got it. And you may want to ask him that. I mean, I think I remember saying that, too. (TR82)

This testimony is clearly equivocal and does not establish that Mr. Parascondola had actually received the 2/5/10 Order.

Mr. Parascondola similarly testified in response to a question by the Assistant Attorney General:

A. I can't say that. I don't know. I did testify and told you that the first time I remember getting that order is the 15th because this case was not normal. That's why I kept it separate in that file. And the first I remember getting it from Mr. Hanemann was the 15th, because we had a conversation and he told me to tickle it, as we normally do for important things, 30 days out to check on it again. That's what I did I tickled it for March 15th. (TR90)

Again in answer to both Petitioner's follow up questions and the Industrial Appeals Judge's question whether Mr. Parascondola kept a calendar when he tickled documents for 30 days out from date of receipt he stated he kept a large calendar on the back of his office door. The date of receipt would be February 15, 2010.

II. ASSIGNMENT OF ERROR

A. Findings of Fact:

Appellant assigns error to Findings of Fact number 1.4. The Department may have delivered the order to the post office, but there is no evidence that the post office actually mailed the order to the Mr. Nakano on February 5, 2010. The Appellant also assigns error to Findings of Facts numbers 1.5 and 1.7.

B. Conclusions of Law:

Appellant disputes Conclusion of Law numbers 2.3, 2.4, 2.6, 2.8, 2.9, and 3.0

C. Issues pertaining to Assignments of Error

1. Was the February 5, 2010 Order timely protested by Mr. Nakano?

2. Is Mr. Nakano entitled to equitable relief from the Department's 60 day limit because misconduct occurred on the part of the Department, and the claimant relied upon the misconduct?

III. STATEMENT OF CASE

A. Standard of Review

When reviewing a superior court decision resulting from an appeal from the Board, review is limited to an "examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Bennett v. Department of Labor & Industries*, 95 Wn2d 531, 534 (1981).

This court's review of whether the trial court's conclusions of law flow from the findings is also de novo. *Watson v. Department of Labor & Industries*, 133 Wn. App. 903, 909 (2006) (citing *Ruse*, 138 Wn.2d at 5). However, this court does not reweigh or rebalance the competing testimony and inference, or apply a new burden of persuasion, for doing that would abridge the right to a trial by jury. *Harrison Memorial Hospital v. Gagnon*, 110 Wn.App. 475, 485 (2002).

Substantial evidence is defined as quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Harrison Memorial Hospital v. Gagnon*, 110 Wn.App. 475, 485 (2002)

IV. ARGUMENT

A. Context of Case

The injured worker in this case suffered grievous and permanent injuries. The Department has denied Mr. Nakano his benefits claiming he was not an employee, but an independent contractor at time of injury. The Department alleges Mr. Nakano committed fraud. The Department denied Mr. Nakano procedurally claiming his protest was not timely. Mr. Nakano has never has an opportunity to respond to these allegations.

RCW 51.12.010 States:

This title shall be liberally constructed for the purpose of reducing to a minimum the suffering and economic loss arising from the injuries and/or death occurring in the course of employment. (Emphasis added)

This statutory directive has been reaffirmed on many occasions. In Dennis v. Dep't of Labor and Industries, 209 Wn.2d 460, 470, 745 P. 2d 1297 (1987) the court held:

RCW 51.04.010 embodies these principles, and declares, among other things, that sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided (by the Act) regardless of questions of fault and to the exclusion of every other remedy.

To this end, the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favored of the worker. (Emphasis added, citations omitted)

B. Argument

The Department's case is simply if custom was followed the 2/5/10 Order was delivered to the U.S. Post Office the evening of 2/5/10 and received sometime the following week. February 5, 2010 was a Friday.

Karen Neill testified that she worked as the receptionist for the law firm. The policy and practice of the firm is to date stamp all mail received from the Department of Labor and Industries. Once date stamped, the mail is "then placed in Mr. Hanemann's box". Mr. Hanemann then processes the mail, sorting it to the paralegal that specializes in that area of practice. Frank Parascondola was the paralegal who focused on Labor and Industries cases in February 2010. He would have received the Order the same date it was received by the firm.

In this case the 2/5/10 Order did not have a date stamp on it (See BR exhibit 4) and testimony of Frank Parascondola. (TR14, 34, 54) Mail received on February 8th, 9th, 10th, and 11th was date stamped. The firm had a new receptionist who started on 2/8/10. However, she had assistance

with the mail 2/8/10 through 2/11/10. The first date the new receptionist was not helped was Friday, February 12, 2010.

Additional evidence supports the conclusion the Order dated 2/5/10 was not received until after 2/11/10. On February 9, 2010 and on February 10, 2010 Mr. Parascondola had telephone and fax contacts with Mr. Nakano's employer and with Mr. Nakano without mentioning that a fraud order alleging a million dollar overpayment affecting both parties had just been received. It is extremely unlikely that Mr. Parascondola would not have discussed the fraud order in his telephone conversation with the Mr. Nakano on February 10, 2010 if he had been aware of the Order. In fact Mr. Parascondola testified he "definitely" would have. Mr. Nakano also testified there was no mention of a new fraud order in that conversation.

The telephone call with Mr. Nakano occurred at 5:14pm on 2/10/10. The February10, 2010 mail had been received. Ms. Neill helped with the mail that day and all mail received was date stamped. In addition, Mr. Parascondola recorded brief notes of the conversation and doesn't mention the fraud order in his notes. This is written documentation entered on the same day it occurred.

The entire record supports a determination that the 2/5/10 fraud Order was received no earlier than February 13, 2010 (Saturday). This is consistent with Mr. Parascondola's testimony that the first date he knows for sure he had the Order was February 15, 2010 which was a Monday. It is also consistent with him tickling the Order 30 days out from his receipt of the Order to March 15, 2010. He further testified February 15, 2010 was the first time he had discussed the fraud order with Mr. Hanemann.

The only contrary evidence was the confusing conversation Mr. Parascondola had with Mr. Gruse where several dates and apparently different documents were discussed. Neither the 2/5/10 Order in the law office file nor the order sent to Mr. Nakano by the law office bore a date stamp or a c.c. notation. Mr. Parascondola did testify he may have told Mr. Gruse he had a copy of the Order in his personal "blue file" with a notation on it that cc'd client on 2/10/10. However, Mr. Parascondola's testimony on this point when directly asked by the Assistant Attorney General if he recalled stating to Mr. Gruse in one of their conversations that the 2/5/10 Order had been received on February 10, Mr. Parascondola responded "No, I don't remember saying that." (TR81) When asked whether he told Mr. Gruse the 2/5/10 Order had a cc on it dated February 10, 2010, Mr. Parascondola responded. (TR82)

A. Yes, because the documents I was looking at when I was talking to Mr. Gruse, the document said cc'd client on 2/10 of 2010, assuming it was the 10th and assuming it was the document. I remember calling him and telling him that I was looking at the incorrect document, I believe, in one of the conversations. So I really don't know when I got it. And you may want to ask him that. I mean, I think I remember saying that, too. (TR82)

When asked again if he had received the 2/5/10 Order on February 10, 2010 Mr. Parascondola responded as follows:

A. I can't say that. I don't know. I did testify and told you that the first time I remember getting that order is the 15th because this case was not normal. That's why I kept it separate in that file. And the first I remember getting it from Mr. Hanemann was the 15th, because we had a conversation and he told me to tickle it, as we normally do for important things, 30 days out to check on it again. That's what I did I tickled it for March 15th. (TR90)

Contrast the equivocal testimony to Mr. Parascondola's response to the Labor & Industries Judge when the Industrial Appeals Judge asked Mr. Parascondola when he knew he had received the February 5, 2010 Order.

> Q. Sir, to the best of your recollection, when was this February 5th, 2010 order received?
>
> A. Between the 10th and the 15th of February, assuming I
>
> Q. No. We don't assume stuff.
>
> A. Okay.
>
> Q. What's your best recollection of when.
>
> A. When I know I got it for sure?
>
> Q. No. Well, that's one question. When did you get it for sure?
>
> A. February 15th is the day I know that I got it.
>
> Q. Excuse me. Is that the first date that you saw that order?
>
> A. That I recollect seeing it, yes. (TR80)

When considering the entire record including it is clear that there is not "substantial evidence" to support a finding that the 2/5/10 Order was received before 2/12/10. The following points support this conclusion:

- The law firm's history of receiving Labor and Industries documents more that 5 days after the date indicated on the document.

- The statistical evidence from the U.S. Postal service that 10% of all 1st class mail is received more than 5 days after mailing. The fact that the Order was not date stamped and would have been if received before 2/12/10.
- Mr. Parascondola testified that the first date he knew he received the Order was 2/15/10.
- The notes regarding Mr. Parscondola's telephone conversation at 5:14pm on 2/10/10 don't refer to the 2/5/10 Order.
- Mr. Nakano testified he didn't discuss a new fraud Order in the 2/10/10 telephone conversation with Frank Parascondola.
- Mr. Prascondola's equivocal statement that mention a cc on the 2/5/10 order when the 2/5/10 Order itself doesn't have a cc on it (BR exhibit 4)

C. Equitable relief

Mr. Gruse and Frank Parascondola had several conversations over the phone before and after 2/5/10. Clearly, Mr. Parascondola was under the belief from talking to Mr. Gruse that the Labor & Industries

proceedings would be placed in abeyance if criminal charges were filed. Mr. Gruse put a different spin on their conversation. Mr. Gruse admitted stating the case was in abeyance; but, he claimed he stated in the telephone conversation in January 2010 that once the criminal charges were filed he would issue an affirming order holding the case in abeyance to protect Mr. Nakano's rights:

> A. Well, I know at one point I told him that we have to wait until criminal charges are filed before we affirm our order, which is to protect the rights of his client, or Mr. Nakano in this case, from being compelled to testify at the Board. (TR116)

What Mr. Gruse claimed makes absolutely no sense. The affirming Order of 2/5/10 renewed the Labor & Industries fraud claim and did not put the claim in abeyance and it certainly didn't protect any of Mr. Nakano's rights.

Mr. Gruse engaged in misleading conduct first, informing Mr. Parascondola that if criminal charges were filed that the Department fraud order would be held in abeyance "to protect Mr. Nakano's rights" and then proceeding to issue a new fraud order after criminal charges were filed which did not hold the proceedings in abeyance.

The Worker's Compensation act is remedial and should be broadly construed to benefit workers.

The court in Kingery v Department of Labor & Industries 132 Wn 2d 162, 937 P. 2d 565 (1997) held 5-4 that the courts equitable powers were not just limited to questions of the claimants competency and some misconduct by the Department in its communications to the claimant. Justice Alexander along with Justice Smith, Johnson and Sanders wrote a dissent to the denial of benefits, to Mrs. Kingery in which they disagreed with the majority that equity grounds required the claimant to be incompetent and for misconduct to occur. Justice Madsen although agreeing with the majority that benefits should be denied, agreed with the dissent that the powers of equity did not require the claimant to be incompetent.

Thus, the ruling was 5-4 that courts can grant equitable relief from the Industrial Insurance Acts' 60 day limit if some misconduct on the part of the Department occurred in communicating its Order to the Claimant. That burden is met here. Clearly, Mr. Parascondola was of the belief based upon the representation of a supervising Department of Labor & Industries employee, Mr. Gruse, that Mr. Nakano's rights would be protected and that this claim would be held in abeyance.

V. CONCLUSION

The trial court in its oral ruling stated that it was likely the firm received the 2/5/10 order on 2/10/10 because of Mr. Parascondola's testimony of his telephone conversation with Mr. Gruse. The actual Order (BR exhibit 4) did not have a cc notation on it.

Karen Neill testified that mail received between February 8 and February 10, 2010 would have a date stamp.

Mr. Parascondola had notes of telephone conversations and fax request on February 9 and February 10, 2010 which do not mention the fraud order. The Order would definitely have been discussed if Mr. Parascondola had received it on 2/10/10. The Petitioner also presented evidence through Karen Neill that it is not unusual to receive Labor & Industries mail more that 5 days after the date it is mailed. It occurs at least once a month. Mr. Parascondola testified the first time he saw the Order was on February 15, 2010; a Monday; that he discussed it for the first time with the attorney on that date and that he tickled it for March 15, 2010. He testified he normally tickles Orders for 30 days after receipt. In addition, United States Postal Service statistics state that 10% of all first class mail in the western Washington area is delivered more that 5 days after it is

posted. All of these facts more than support the determination that the Order wasn't received before 2/12/10.

Mr. Nakano should be given his day in court. This is a very significant claim of nearly $1,000,000.00. There is not substantial evidence in this record to support the Findings of Facts.

In addition, principles of fairness and equity should dictate that Mr. Nakano's appeal should be granted.

This court should reverse the trial court's determination and rule that the protest received on 4/13/10 was timely and Mr. Nakano be given his in day court.

Dated this 7th day of December 2011.

Jack W. Hanemann
Attorney for Appellant
WSBA #6609

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHARLES J. NAKANO,
Appellant,

v.

STATE OF WASHINGTON DEPT OF L&I,
Respondent.

No: 42642-1-II

CERTIFICATE OF MAILING

I certify that on this day I served a true and accurate copy of the foregoing BRIEF OF APPELLANT, to be served on the following parties in the manner indicated below:

Original and Copy, U.S. Mail, Postage Pre-paid:

Clerk of the court
Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Copies, U.S. Mail, Postage Pre-paid to:

Mr. John S. Barnes
Office of the Attorney General
PO Box 40121
Olympia, WA 98504-0121

JACK W. HANEMANN, INC., P.S.
Attorneys at Law
State & Sawyer Building, Ste. 101
2120 State Avenue N.E.
Olympia, Washington 98506
(360) 357-3501
Fax: (360) 357-2299

Charles Nakano
2727 Graf Rd
Centralia, WA 98531

Dated this 7th day of December 2011.

Gretchen Clark

Gretchen Clark
Legal Assistant

JACK W. HANEMANN, INC., P.S.
Attorneys at Law
State & Sawyer Building, Ste. 101
2120 State Avenue N.E.
Olympia, Washington 98506
(360) 357-3501
Fax: (360) 357-2299